CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

Application no. 10545/05
by Megan DAY
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 11 December 2007 as a Chamber composed of:

Mr J. CASADEVALL, *President*,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having regard to the above application lodged on 12 November 2001,

Having regard to the Government's observations dated 28 April 2006,

Having regard to the unsuccessful friendly-settlement negotiations conducted pursuant to Article 38 § 1 (b) of the Convention,

Having regard to the Government's request to strike the case out of its list of cases and the text of a unilateral declaration made with a view to resolving the issues raised by the application,

Having regard to the applicant's response to the Government's unilateral declaration,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Megan Day, is a British national who was born in 1971 and lives in Birmingham. She was represented before the Court by Tyndallwoods, a firm of solicitors based in Birmingham. The United Kingdom Government ("the Government") were represented by their Agent, Ms E. Willmott, of the Foreign and Commonwealth Office, London.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

1. Background facts

The applicant was, at the material time, a Senior Aircraftswoman in the Royal Air Force. She was dismissed from the armed forces on 28 April 1993 pursuant to the policy of the Ministry of Defence against homosexuals in the armed forces.

2. Domestic proceedings

On 21 December 2000 the applicant submitted a claim to the Employment Tribunal arguing that her dismissal, and the treatment to which she was subjected, breached the Sex Discrimination Act 1975 ("the 1975 Act"). As a result of the House of Lords' judgment in *MacDonald (AP) (Appellant) v. Advocate General for Scotland (Respondent) (Scotland)* dated 19 June 2003, the applicant withdrew her domestic proceedings on 13 November 2003.

B. Relevant domestic and European law and practice

The law and practice in force at the relevant time concerning the dismissal of homosexuals from the armed forces are described in the decision of the Court in the case of *MacDonald v. the United Kingdom* (no. 301/04, 6 February 2007).

COMPLAINTS

1. The applicant complained under Articles 3, 8 and 10, alone and in conjunction with Article 14 of the Convention, about the investigation into

her sexual orientation and about her subsequent dismissal from the armed forces pursuant to the absolute policy against homosexuals in those forces.

2. She also complained under Article 13 that she did not have an effective domestic remedy in this regard.

THE LAW

A. Complaints under Articles 8 and 13 of the Convention

The applicant complained about the interference with her right to respect for her private life by the investigation into her sexual orientation and her dismissal from the armed forces. She invoked Article 8 of the Convention, which provides, in so far as relevant, that:

> "1. Everyone has the right to respect for his private (...) life (...).
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

She further complained under Article 13, about the lack of an effective remedy for these alleged violations of her rights, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

On 20 December 2005 the respondent Government were given notice of the application and were requested to submit their written observations, on the admissibility and merits of the case, in respect of the applicant's complaints under Articles 8 and 13 of the Convention.

In their submissions dated 28 April 2006 the Government accepted that the tribunal proceedings lodged by the applicant were effective within the meaning of Article 35 § 1 of the Convention so that her claim had therefore been introduced with the Court within the six-month time-limit set down by the same provision. However, they stated that although they did not contest the admissibility of the case, they were unable to confirm or deny whether there had been a violation of Article 8, alone or in conjunction with Article 13 of the Convention, in respect of the applicant's dismissal from the armed forces. They noted that there were no longer any files in existence relating to the applicant's service in the armed forces or any records showing whether the applicant was subjected to any investigation of her sexual orientation.

The applicant submitted her response on 22 August 2006 together with the relevant supporting documentation.

The Government filed a unilateral declaration on 15 June 2007 as an alternative to the acceptance by the applicant of their friendly-settlement proposal. It provided as follows:

> "The Government of the United Kingdom regrets the investigation into the sexual orientation of the applicant Megan Day and her subsequent discharge from the Army on the grounds of her sexual orientation. The Government acknowledges that the investigation and discharge breached the applicant's rights under Article 8 of the Convention and of Article 13 in conjunction with Article 8.
>
> In regard to this issue, the Government recalls that on 12 January 2000, and in response to the Court's judgments on the merits in the Lustig-Prean and Beckett and the Smith and Grady cases, it introduced The Armed Forces Code of Social Conduct Policy Statement lifting the ban on homosexuals serving in the military. The Code is intended to explain the Armed Forces' revised policy on personal relationships involving Service personnel and applies to all members of the Armed Forces, regardless of their gender, sexual orientation, rank or status, and provides a clear framework within which people in the services can live and work. Furthermore, it complements existing policies, such as zero tolerance towards harassment, discrimination and bullying. Under paragraph 5 of the Policy Statement, when considering possible cases of social misconduct, and in determining whether the Service has a duty to intervene in the personal lives of its personnel, Commanding Officers at every level must consider each case against a Service Test based on whether the actions or behaviour of an individual has adversely impacted or is likely to impact on the efficiency or operational effectiveness of the Service and not on the sexual orientation of the personnel. Furthermore, Guidance Notes for Commanding officers have been issued in order to explain the Code of Conduct and to give officers detailed guidance on how it should be implemented.
>
> In these circumstances, and having had regard to the particular facts of Ms Day's case and the amount of financial loss she suffered, the Government declares that it hereby offers to pay ex gratia to the applicant the amount of £49,489 [pounds sterling]. This sum, which also covers legal expenses connected with the case, shall be paid in pounds sterling to a bank account named by the applicant within three months from the date of the striking-out decision of the Court pursuant to Article 37 of the European Convention on Human Rights. This payment will constitute the final settlement of the case."

On 10 July 2007 the applicant rejected the Government's offer of a friendly settlement.

The Court observes at the outset that the parties were unable to agree on the terms of a friendly settlement of the case. It recalls that, according to Article 38 § 2 of the Convention, friendly-settlement negotiations are confidential and that Rule 62 § 2 of the Rules of Court further stipulates that no written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in contentious proceedings. However, the declaration was made by the Government outside the framework of the friendly-settlement negotiations.

The Court also recalls that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases even if an applicant wishes the examination of the case to be continued, where the circumstances lead to one of the conclusions specified under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court to strike a case out of its list if:

> "for any other reason established by the Court, it is no longer justified to continue the examination of the application".

Article 37 § 1 *in fine* includes the proviso that:

> "However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

The Court notes that it has specified in a number of cases the precise nature and extent of the obligations which arise for the respondent State under Articles 8 and 13 of the Convention as regards the investigation and dismissal of homosexuals from the British armed forces. It has further made awards for just satisfaction in those cases (*Lustig-Prean and Beckett v. the United Kingdom* (just satisfaction), nos. 31417/96 and 32377/96, 25 July 2000 and *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, ECHR 2000-IX; *Perkins and R. v. the United Kingdom*, nos. 43208/98 and 44875/98, 22 October 2002; and *Beck, Copp and Bazeley v. the United Kingdom*, nos. 48535/99, 48536/99 and 48537/99, 22 October 2002).

It has carefully examined the terms of the Government's declaration. Having regard to the nature of the admissions contained in the declaration, the speed and nature of the State's reaction to the afore-mentioned lead judgments in *Lustig-Prean and Beckett v. the United Kingdom* and *Smith and Grady v. the United Kingdom* (notably through the introduction of The Armed Forces Code of Social Conduct Policy Statement), as well as the amount of compensation proposed, the Court considers that it is no longer justified to continue the examination of the application (Article 37 § 1 (c)) (see, *MacDonald v. the United Kingdom*, no. 301/04 (dec.) February 2007; and, for the relevant principles, *Tahsin Acar v. Turkey*, [GC], no. 26307/95, §§ 75-77, ECHR 2003-VI).

In light of all the above considerations, the Court is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of the application in so far as it concerns the applicant's complaints under Articles 8 and 13 of the Convention (Article 37 § 1 *in fine*).

Accordingly, this part of the application should be struck out of the list.

B. Remaining Complaints

The applicant also invoked Articles 3, 10 and 14 of the Convention. To the extent that these complaints have not already been covered by the terms of the Government's unilateral declaration, the Court considers that they are, in any event, manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Takes note of the terms of the respondent Government's declaration;

Decides to strike the application out of its list of cases in accordance with Article 37 § 1 (c) of the Convention in so far as it concerns the applicant's complaints under Articles 8 and 13 of the Convention;

Declares the remainder of the application inadmissible.

T.L. EARLY
Registrar

Josep CASADEVALL
President